SUPREME COURT, U. S.

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-882

HENRY McGURREN,

Petitioner,

vs.

LEONARD B. ETTELSON and
WILLIAM J. FRIEDMAN,

Respondents.

BRIEF OF RESPONDENT, SAMUEL BERKE, RECEIVER OF CITY SAVINGS ASSOCIATION IN OPPOSITION TO CERTIORARI

DON H. REUBEN
STEVEN L. BASHWINER
130 E. Randolph Drive
Chicago, Illinois 60601
(312) 726-2929

Attorneys for Samuel Berke, Receiver City Savings Association

KIRKLAND & ELLIS
Chicago, Illinois
Of Counsel

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	8
Conclusion	10

Table Of Authorities

Cases

DeKorwin v. First National Bank of Chicago, 235 F.2d 156 (7th Cir. 1956) 8

Farmers' Loan and Trust Co. v. Waterman, 106 U.S. 265, 1 S.Ct. 131, 27 L.Ed. 115 (1882) 9

In Re Michigan-Ohio Building Corporation, 117 F.2d 191, 193 (7th Cir. 1941) 8

Kimball v. Kimball, 174 U.S. 158, 19 S.Ct. 639, 43 L.Ed. 932 (1899) 9

Mensik v. Smith, 18 Ill.2d 572, 166 N.E.2d 265 (1960) .. 3

Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895) 9

Tcherepnin v. Franz, 461 F.2d 544 (7th Cir.); cert. denied Lowenthal, et al. v. Tcherepnin, et al., 409 U.S. 1038 (1972) 4

Tcherepnin v. Franz, 485 F.2d 1251 (7th Cir. 1973) 2

Tcherepnin v. Franz, 316 F.Supp. 714 (N.D. Ill. 1970) .. 3

Tcherepnin v. Kirby, 416 F.2d 594 (7th Cir. 1969) 4

Tcherepnin v. Knight, 389 U.S. 332 (1967) 4

U. S. v. Adamant Company, 197 F.2d 1 (9th Cir.); cert. denied Bullen v. Scoville, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952) 8

Rules

Federal Rules of Civil Procedure, 28 U.S.C., Rule 25 1

Statutes

15 U.S.C. §78a et seq. 4
28 U.S.C. §2106 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-882

HENRY McGURREN,

Petitioner,

vs.

LEONARD B. ETTELSON and WILLIAM J. FRIEDMAN,

Respondents.

BRIEF OF RESPONDENT, SAMUEL BERKE, RECEIVER OF CITY SAVINGS ASSOCIATION IN OPPOSITION TO CERTIORARI

Respondent, Samuel Berke,* Receiver of City Savings Association, respectfully submits that the Petition for Writ of Certiorari filed by Henry McGurren is without merit and should be denied.

(*) On March 27, 1973, Leonard B. Ettelson and William J. Friedman, the named respondents in the instant Petition, resigned as Receivers of City Savings Association. Judge Samuel Berke was appointed by the Federal District Court as their successor. He is automatically substituted as respondent herein. (F.R.C.P., Rule 25)

QUESTION PRESENTED.

This case does not raise the "Questions Presented" framed by McGurren's Petition (at p. 2). Rather, the sole question presented is whether the Court of Appeals for the Seventh Circuit correctly dismissed McGurren's appeal after finding both that no judgment had been entered against him and that he claimed no personal or sustaining interest in the properties that were the subject of the District Court's judgment.

STATEMENT OF THE CASE.

Petitioner's statement is misleading and incomplete. We restate:

A. Nature of the Case.

This petition arises from an order of the U.S. Court of Appeals for the Seventh Circuit dismissing an appeal from a judgment entered by the Federal District Court for the Northern District of Illinois. *Tcherepnin* v. *Franz*, 485 F. 2d 1251 (7th Cir. 1973). That judgment imposed a constructive trust upon 14 parcels of real estate situated in DuPage County and Cook County, Illinois. (App. 34) Henry McGurren, Petitioner herein, held title to several of the above-described parcels solely as Trustee under certain land trusts and not individually. (App. 33-4) The title holders and beneficial interest holders of twelve of these fourteen parcels of real estate never appealed from the judgment below. (App. 2-4) Two purported "owners", Braewood Building Corporation and Peerless Closure

Company, filed related appeals (Nos. 18933 and 18958) wherein the judgment of the District Court was affirmed; however, those parties have not sought certiorari. Only Henry McGurren, against whom no judgment was entered, is a petitioner herein.

B. The Course of Proceedings and Disposition Below.

The judgment affirmed by the Court of Appeals was entered by the District Court, Judge William J. Campbell presiding, pursuant to an ancillary cross-complaint filed by Respondent's predecessors, the Receivers of City Savings Association (hereafter "City Savings"). *Tcherepnin* v. *Franz,* 316 F.Supp. 714 (N.D. Ill. 1970).

City Savings has a sad and unfortunate history. (See *Mensik* v. *Smith*, 18 Ill.2d 572, 166 N.E.2d 265 (1960)) The Association was first closed by the State of Illinois on April 25, 1957, but after protracted legal proceedings was restored to C. Oran Mensik (hereafter "Mensik") and his associates; Mensik was President and Chief Executive Officer of City Savings. (Tr. 218)(*) City Savings was again closed by the State of Illinois on June 30, 1964 and on September 10, 1964, was placed under the control of "voluntary liquidators" elected by Mensik voting the proxies of the City Savings depositors. (R. 513, p. 68)

(*) Transcript references (Tr.) are to the proceeedings held in the District Court on May 4 through May 8, 1970 and on May 21, 1970. Record references (R.) are to the numbered portions of the Record on Appeal in the Court of Appeals. References to the order of the District Court and related documents (C.) are to the particular pages of the Short Record filed in the Court of Appeals by Peerless Closure Company on December 7, 1970 in support of its Motion for Supersedeas. (No. 18933)

The plaintiffs' complaint, alleging fraud and seeking recision of their purchases of shares in accordance with the Securities Exchange Act of 1934(*), was filed on July 24, 1964. (R. 1) On September 7, 1968, after resolution of the threshold question of jurisdiction by this Court (*Tcherepnin* v. *Knight,* 389 U.S. 332 (1967)), and on motion of all depositors of City Savings, the District Court removed the "voluntary liquidators" and appointed federal receivers. That order was affirmed by the Court of Appeals for the Seventh Circuit. *Tcherepnin* v. *Kirby,* 416 F.2d 594 (7th Cir. 1969).

Subsequent to their appointment, on April 4, 1969, the Receivers filed a cross-complaint against Mensik, several other officers and directors of City Savings, and certain other persons and corporations. (R. 306, 416) Petitioner Henry McGurren was named as a cross-defendant both individually and as Trustee. (R. 306, 416) This cross-complaint alleged a massive land fraud scheme, pursuant to which Mensik fraudulently disbursed City Savings funds to persons and corporations acting as his nominees for the acquisition of real estate to be held by these nominees for Mensik's benefit. (R. 306, 416) The cross-complaint stated that the wrongful acts of Mensik and his nominees—including McGurren—dictated the imposition upon the properties of a constructive trust for the benefit of City Savings and its depositors. (R. 306, p. 16)

On May 27, 1969, McGurren filed his appearance and that of Richard F. McPartlin as his attorney, (R. 378) and moved to strike and dismiss the Receivers' cross-complaint. (R. 380) This motion was denied. (R. 584)

(*) 15 U.S.C. §78a, *et seq.*; See *Tcherepnin* v. *Franz,* 461 F.2d 544 (7th Cir.); cert. denied *Lowenthal, et al.* v. *Tcherepnin, et al.,* 409 U.S. 1038 (1972).

Thereafter, on April 28, 1970, McGurren filed his answer to the cross-complaint of the Receivers and denied that he had participated in the Mensik scheme of fraud. (R. 8, p. 7)

On May 1, 1970, the Receivers served notice for an expedited hearing on the issue of title to the properties set forth in the cross-complaint as amended. (R. 15, 16)

Hearings were held on May 4, 1970, through May 8, 1970 and on May 21, 1970. The Receivers introduced extensive evidence of the scheme to defraud City Savings and of McGurren's complicity therein. (Tr. 2-657) McGurren fully and actively participated in these hearings: he engaged in frequent colloquies with the Court and counsel (Tr. 2-10; 89-93; 516-523); he cross-examined the Receivers' expert witness (Tr. 438-447); he testified extensively both as an adverse party called by the Receivers (Tr. 270-297; 305-370), and on behalf of the cross-defendants (Tr. 631-647); and he examined the Receivers' documentary evidence at the office of the attorneys for the Receivers during a recess in the hearings. (Tr. 453)

On August 6, 1970, after McGurren and the Receivers had filed briefs (R. 46, 53), the District Court entered an order finding that the scheme of fraud set forth by the Receivers during the hearings McGurren attended had been established "clearly, convincingly and unequivocally." (C. 29) The Court imposed a constructive trust on all the properties described in the Receivers' cross-complaint. (C. 6-50)

No judgment was entered against McGurren, who remains before the District Court as a cross-defendant. (C. 6-50) Nonetheless, on November 6, 1970, McGurren filed

a Notice of Appeal. (C. 54) Subsequent to filing his Notice of Appeal but prior to filing his Brief in the Court of Appeals, McGurren conveyed all of his interest in the above-described properties to the Receivers. (App. 33) In his Brief in the Court of Appeals, McGurren admitted that he had "never claimed any beneficial ownership of the property involved, . . . is not concerned with the question of title to the property, and has already quit claimed his interest as Trustee to the Receivers. . . ." (at p. 3)

On July 27, 1973, after oral argument, the U. S. Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court in Appeals No. 18933 (Peerless Closure Company) and 18958 (Braewood Building Corporation). (App. 34) The Court dismissed McGurren's appeal (App. 34):

> "Presumably Mr. McGurren had a sufficient apparent interest in his capacity as trustee to appeal from the judgment in order to seek reversal in order to recover title for the benefit of those for whom he was trustee. He has not, however, attacked any part of the judgment, but is concerned only with findings of the court characterizing his activity, and with whether those findings will be binding on him when the receiver's claim of his personal liability comes on for trial.
>
> This court, however, has no jurisdiction to review findings, or such matters as the sufficiency of notice, except as an incident to a proper appeal from the judgment entered in the proceedings where such finding was made or such procedures taken, and Mr. McGurren has made no challenge to the judgment it-

self. We conclude that under the circumstances he has no standing to seek review of the findings nor a declaration that they went beyond the scope of the notice. We express no opinion on the extent to which the findings may affect the later determination of other claims against him. We have treated with the findings as to his role only to the extent they support the findings and judgment with respect to Peerless."

On September 12, 1973, McGurren's Petition for Rehearing was denied. (App. 35-36) On December 5, 1973, the instant Petition for Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT McGURREN HAS NO STANDING TO APPEAL FROM A JUDGMENT ENTERED AGAINST PERSONS OTHER THAN HIMSELF.

We respectfully submit that the Order of the Court of Appeals for the Seventh Circuit dismissing McGurren's appeal is manifestly correct. The federal statutes clearly provide that an appeal lies only from a judgment, not solely from findings of fact. 28 U.S.C. § 2106. The law is also clear that no one may appeal from a judgment unless he has a direct, immediate, pecuniary and substantial interest therein. *DeKorwin* v. *First National Bank of Chicago,* 235 F.2d 156 (7th Cir. 1956).

As the Court held in *In Re Michigan-Ohio Building Corporation,* 117 F.2d 191, 193 (7th Cir. 1941):

> "Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein, direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed. . . . Furthermore the right invaded or the injuries sustained must be subsisting and immediate, not one arising as some possible, remote, unforeseen consequence. . . . [citing cases]."

And in *U.S.* v. *Adamant Company,* 197 F.2d 1 (9th Cir.); *cert. denied, Bullen* v. *Scoville,* 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952), the Court held (at p. 5):

"[A]n appeal lies from a judgment, not from findings, 28 U.S.C. §§2106-07. In order that a judgment be appealable at the behest of a party, the party must be aggrieved by it. 4 C.J.S., Appeal and Error, §183; 2 Am. Jur., Appeal and Error, §152; *Farmers' Loan and Trust Co.* v. *Waterman,* 1882, 106 U.S. 265, 1 S. Ct. 131, 27 L.Ed. 115; *MacKinnon* v. *American Agar Co.,* 1934, 9 Cir., 73 R.2d 835, 837; *In Re Schwartz,* 1937, 2 Cir., 89 F.2d 172, 173."

In the instant case, McGurren has expressly disclaimed any interest in the properties that were the subject of the judgment below. (McGurren Brief, No. 18952, p. 3) Instead, McGurren is "concerned only with findings of the Court characterizing his activity, and with whether those findings will be binding on him when the receivers' claim of his personal liability comes on for trial." (App. 34)(*) Accordingly, because McGurren has no direct, immediate, pecuniary or substantial interest in the subject matter of the judgment below, his appeal was properly dismissed by the Court of Appeals. *Mills* v. *Green,* 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895); *Kimball* v. *Kimball,* 174 U.S. 158, 19 S.Ct. 639, 43 L.Ed. 932 (1899); *Farmers' Loan and Trust Co.* v. *Waterman,* 106 U.S. 265, 1 S.Ct. 131, 27 L.Ed. 115 (1882).(**)

(*) For example, McGurren in his Petition herein urges (at p. 13; emphasis added):

"[T]he *effect of the District Court's findings* and the refusal of the Court of Appeals to review same *exposes McGurren to future liability* while being precluded from challenging *the propriety or sufficiency of those findings.*"

(**) We refrain from inviting this Court's attention to the numerous misstatements of the record and the law that appear in McGurren's Petition because such argument would be irrelevant in the instant circumstances.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the Petition for Writ of Certiorari filed by Henry McGurren should be denied.

Respectfully submitted,

DON H. REUBEN
STEVEN L. BASHWINER
130 E. Randolph Drive
Chicago, Illinois 60601
(312) 726-2929

Attorneys for Samuel Berke, Receiver City Savings Association

KIRKLAND & ELLIS
Chicago, Illinois
Of Counsel